

ONTARIO HUMAN RIGHTS CODE
R.S.O. 1990, c. H. 19

BOARDS OF INQUIRY

BETWEEN:

Laura Roberts

Complainants

and

Ontario Human Rights Commission

Commission

and

Vince Chmiel and Club Expose (operated by 879678 Ontario Limited)

Respondents

DECISION

BOARD OF INQUIRY: R. Hartman

APPEARANCES: M. Hart Counsel for the Ontario
Human Rights Commission
L. Roberts Complainant
V. Chmiel, and Club Expose Respondents
(879678 Ontario Limited)

DATES AND PLACE OF
HEARING: June 3, 30, July 21, 1993
Toronto, Ontario



Appointment of Board

By letter dated May 7, 1993, the Minister of Citizenship appointed this Board pursuant to s. 38(1) of the *Human Rights Code*, to inquire into a complaint filed by Laura Roberts on October 2, 1992, alleging discrimination in employment by Club Expose and Vince Chmiel on the basis of race and colour .

Nature of Complaint

In the complaint filed with the Commission on October 2, 1992, Ms. Roberts was described as "a freelance Burlesque Dancer 'stripper' [who worked] under the stage name of Nicole with a partner". She alleged that she worked for Club Expose for one week in February, 1992, and that her partner, who was white, was asked by Mr. Chmiel to return to work the following week alone "as he did not want a black woman working in his club." Ms. Roberts alleged that when she confronted Mr. Chmiel, on the telephone, about the comments he made to her partner, "he confirmed that he did not want black women working in his club because they brought in black clientele and further stated that he did not want their business." In the filed complaint, she also alleged that she was "made to feel uncomfortable by Vince and the staff who snickered behind my back and were also rude to me". She stated at the hearing that this allegation was not correct and should not have formed part of her complaint, which is based solely on an alleged denial of re-employment in a conversation between her partner and Mr. Chmiel and a telephone conversation between Mr. Chmiel and Ms. Roberts.

Ms. Roberts alleges that her right to equal treatment in employment without discrimination because of race or colour was infringed, contrary to sections 5(1) and 9 of the *Human Rights Code*.

Proceedings

On June 3, 1993, the hearing was commenced by conference call with Ms. Roberts and Commission counsel, Mr. Hart, participating. The respondents, Club Expose and Mr. Chmiel, did not participate, although they were notified of the hearing by letter at the address for Club Expose. The current owner of Club Expose, Mr. Ronald Johnson, telephoned the Boards of Inquiry office on May 13, 1993 and advised that the whereabouts of the former owner, Mr. Vince Chmiel, were not known. A date for hearing the merits of the complaint was set for June 30, 1993. Notice of

the hearing was to be sent to Club Expose and Mr. Chmiel after further efforts by Commission counsel to verify a current address for Mr. Chmiel. The notice was to advise the respondents that failure to attend the hearing on June 30, 1993 would result in the hearing proceeding in their absence.

On June 30, 1993, the Commission filed documents to verify the legal ownership of Club Expose and the address of Mr. Chmiel. On the basis of these documents, the Commission asked permission to withdraw the complaint as against Mr. Ron Johnson and provided a current address for the respondent, Mr. Chmiel. The Board granted the Commission's request to amend the respondents named to Mr. Chmiel, as sole shareholder and officer of 879678 Ontario Limited, owner and operator of Club Expose, and Mr. Chmiel, in his personal capacity. While the initial notice had been in accordance with s. 6 of the *Statutory Powers and Procedures Act*, ("SPPA"), the subsequent notice did not set out that the hearing would proceed in the respondents' absence on June 30, 1993. While it was possible that Mr. Chmiel had received both notices, it was not certain and the provisions of the SPPA were unambiguous in their requirements for valid notice. The hearing was adjourned until July 21, 1993 to allow for proper notice.

On July 9, 1993, the Registrar of the Boards of Inquiry advised the parties and the Board by memo : 1) that notice of the July 21, 1993 hearing had been couriered to Mr. Vince Chmiel, in his personal capacity and as owner of 879678 Ontario Limited, operator of Club Expose, at the address obtained by the Commission; 2) that on June 30, 1993, he had called the number provided for Mr. Chmiel and was advised by a woman, who identified herself as his wife, that Mr. Chmiel had gone to the hearing that morning; 3) that on July 2, 1993, Mr. Chmiel telephoned the Boards of Inquiry office, advised that the address given for service by the Commission was out of date and was his ex-wife's, but gave no new address; 4) that Mr. Chmiel was verbally advised of the date, place and time of the July 21st hearing in this conversation. [The Board notes that Mr. Chmiel gave the address for service as his current address at the hearing on July 21, 1993.]

Present at the hearing on July 21, 1993 were Laura Roberts, complainant, Mr. Hart, counsel for the Commission, and Mr. Chmiel, who chose to act as his own representative. Two witnesses, B. Power and M. Harris, attended and M. McArthur, Case Co-ordinator, as an observer.

Board's Reasons

The issue in this complaint is straightforward in all respects except for its context in what some would call the 'sex trade industry'. The Board is not aware of any other cases applying the Code

in this context but there is nothing in the *Code* which would appear to limit its application to conventional employment contexts.

The complaint raises the issue of the nature of the employment relationship between Ms. Roberts, Club Expose and Vince Chmiel. If an employment context is established, it must be determined whether Ms. Roberts was discriminated against, contrary to sections 5 and 9, because of race or colour as alleged.

The evidence before the Board consisted of sworn testimony by Ms. Roberts, Ms. Power, Ms. Harris and Mr. Chmiel. It should be noted that Ms. Power and Ms. Harris were excluded from the hearing room for all testimony but their own. Ms. Roberts gave testimony first and Mr. Chmiel, present throughout the testimony of all other witnesses, gave his last. The Board's assessment of the credibility of the testimony heard is discussed below.

I. Was there an employment relationship?

a. General background information

Mr. Chmiel became the sole director and shareholder of 879678 Ontario Limited on or about May 1, 1990. This company operated a club under the business name of Club Expose located in Richmond Hill, Ontario at the Blackhawk Motor Inn. The Town of Richmond Hill has an Adult Entertainment By-law, with licensing provisions, which governs businesses such as Club Expose. Mr. Chmiel applied for an operator's licence for Club Expose with the Town of Richmond Hill on January 2, 1991. It appears that a licence was not granted and a dispute arose between the Club and the Town which resulted in its closure in February, 1993.

Both the previous owners and Mr. Chmiel offered entertainment in the club. The Board heard a number of descriptions for the entertainment provided - from stripper, burlesque dancer, table dancer, client entertainment, to nude dancer. The Board will use the latter term in this decision as it appears to be the simplest and most descriptive. The information before the Board was that only females were employed to provide this entertainment. The object was to have customers stay and buy alcoholic or other beverages while in the club.

Mr. Chmiel described his business and hiring criteria as follows:

...we would hire dancers to utilize our entertainment budget, such as it was from time to time, to the optimum advantage of the business, which was therefore designed to attract and satisfy the customers as much as possible, without respect to the colour of the girl or her racial background, I guess you would say.

The primary things that we looked for, and I as the owner instilled in the managers, was that the girls be friendly and amiable in a reasonable and civil way with the customers, and in such a fashion that the customers would enjoy their visit to the club and the female companionship that they would encounter there, that they be, as much as feasible, be attractive, and not overweight or bearing tatoos.

These were the type of criteria that I sought in the girls that we hired,...

...Like, we felt that the customers wanted to have a turnover of faces, much as in a singles bar. People go there because they see a lot of new faces perhaps, and have a chance to strike new friendships. There is a desire to have a turnover of girls in a dance club of this sort, to a large extent.

The Board was advised by Mr. Chmiel and by Ms. Harris that there are a number of ways to get work in clubs like Club Expose. A woman could show up at a club to offer her services for a shift or part of one. A woman could have regular employment with a club for a time if she had built up a regular clientele which a club wished to retain. More commonly, however, a woman would show up at a club through the use of an agency. These agencies operated in much the same way as temporary help agencies in the office, trucking and unskilled labour businesses. Clubs could have arrangements with one or more agencies and vice versa.

Ms. Harris, owner and operator of M Productions, provided clubs, such as Club Expose, with a steady supply of dancers. She elaborated as follows:

...first I will go see a club owner if he wants, or a club owner will call me because he is looking for dancers. I would set up an appointment and go to the club. They will tell me basically what they are looking for in girls, how many black girls I am allowed to have, and if I am not allowed to have any black girls because they don't want them in their clubs, and how much they pay, and what the shifts are, and how many girls they

need per week....The girls call me Tuesday or Wednesday, get their bookings, and I call the clubs and confirm the girls, and they go to work on Mondays. That's it.

Ms. Harris said that she was paid a pre-arranged fee per week for each dancer sent, with discounts for clubs where a number of dancers are sent per week. Ms. Harris said that she was paid:

Sixty dollars per week for the girl. But the more girls you book, you usually have a deal with the club so you are making less money per girl but you are booking more girls into the club.

The women were paid by the clubs, mostly in cash, at the end of their last shift. In addition to shift pay, nude dancers collected and kept money received directly from club customers through table dancing or other service. The agent was paid per shift, per woman, usually by invoice, from the club. Neither the agent or the nude dancer were paid for shifts missed for illness or other reasons. Ms. Harris was asked what would happen if a woman failed to show up at a club as directed. Ms. Harris stated that upon being advised by a club that a dancer failed to show up, she would just call another dancer to fill in for that shift or the next. She would not be paid by the club if a shift was lost this way and she said that disputes would arise where clubs falsely advised that a dancer did not show up for a shift.

To remain competitive and maintain arrangements made with particular clubs, agents had to establish a supply of female nude dancers. Ms. Harris said that she obtained dancers as follows:

Well, some of them come to me through other dancers. I also have an ad in The Sun newspaper, and some girls I have known for years. So usually through ads where we train them to dance, or through a girlfriend, or they will come into the club straight off the street.

[Ms. Harris' agency was located in Lipsticks, another club providing female nude dancers as entertainment.]

The procedure for obtaining employment through the use of an agent was as follows. The agent would match a club request with a woman looking for work and tell her to show up at the club for the stated shift ready to work. Since most women did not use their real names and were reluctant to give their addresses, most employment information consisted of a dancer's stage name, perhaps her telephone number or that of the agent.

Ms. Harris said that it was common in the industry for clubs to visually assess a dancer, who showed up for work, to decide whether they wanted her to work in their club. Ms. Harris stated:

Well, a club owner doesn't want to tell a girl that either she is too heavy, or that she is not good looking enough, or he has too many black girls on the schedule. So instead of telling a dancer that, they are more likely to say that "Your agent didn't book you here." And when the girl calls me and says "My name is not on schedule," I know the club doesn't want her...and then I would find somewhere else for her to work.

She said that some clubs would accept everyone she sent and others gave special instructions with which she would comply before sending someone she knew would be rejected. She stated that such special instructions commonly were with respect to colour or race. She said that "black girls" were not wanted at all in some clubs and in others, only with restrictions on number and frequency. She said that "oriental girls", "Mexicans" and/or "Spanish speaking girls" were "very much wanted in Toronto by club owners".

Sometime in June, 1992, Ms. Harris was employed by Mr. Chmiel at Club Expose as his night manager. In that capacity, she handled the hiring of nude dancers until she left the club in September, 1992.

Mr. Chmiel was given the opportunity to question witnesses called by the Commission and was sworn to give testimony on his own behalf. He did not choose to call any witnesses or produce any documents, saying both he did not have the time and was unable to because some of the assets of Club Expose had been seized by the landlord a few months ago. He made, however, no specific attempts to obtain witnesses or documents for the purpose of this hearing, he said, other than to make a note of black dancers hired in the summer of 1992. Mr. Chmiel was given considerable latitude in his questioning given he was a layperson representing himself. While very articulate in his understanding and argument of the issues before the Board, the Board found his testimony unreliable as it fluctuated back and forth from apparent candour to evasiveness on important issues. The Board preferred the testimony of Ms. Harris who, as a witness, was direct, straightforward and not lacking in credibility. In any event, their testimony regarding the industry generally was not in conflict.

b. Ms. Roberts' relationship with Club Expose

Ms. Roberts was born in 1963. Since coming to Ontario from Nova Scotia, she worked in various capacities in the banking industry for several years. In September, 1991, she began a community college program for counsellor training and worked part-time at a community drop-in centre. Her roommate, Ms. Power, worked as a nude dancer for several years and Ms. Roberts said that she was attracted by the money that could be made. She said:

I wasn't looking for a job. Well, at the time when I was going to school I was working at 519 Church, and Barbara was working, dancing, and she was coming home with money, and, I don't know, I just felt like I had to pull my weight too, and I didn't have to fill out an application, and, I don't know, I just did it, you know.

Ms. Roberts and Ms. Power decided they would work together as dance partners. It was agreed that Ms. Power would speak to her agent, Melissa Harris, to arrange a booking for both of them.

Ms. Harris recalled booking Ms. Roberts and Ms. Power, through a conversation with Ms. Power, at a club for one week early in February, 1992. She said that after working only the Monday night of the week-long engagement, Ms. Power told her she did not feel comfortable working at that club, and asked Ms. Harris for another booking.

Ms. Harris said that she had booked dancers for Club Expose when it was operated by its previous owners a year or so previously. In January, 1992, she said that she had arranged with the current owner, Vince Chmiel, to again book dancers for Club Expose. She was not aware of any special requests from this club of any kind at this time, she said. She therefore sent Ms. Roberts and Ms. Power to Club Expose the next day, a Tuesday. She said that she understood that they were being booked as a pair and that this was not unusual.

Ms. Roberts testified that she and Ms. Power worked the night shift at Club Expose on Tuesday, Thursday, Friday and Saturday of the first week in February, 1992. She said that she was sick on Wednesday and neither she nor Ms. Power went to the club. She said that since it was her first week of nude dancing, she was reassured about her performance when other dancers commented on how well she danced for a beginner and that her nightly tips for table dancing exceeded theirs. She said that she received roughly \$200 each night, in addition to her shift pay. She was not sure but thought she received \$3-400 shift pay for four shifts, after her last shift on Saturday. She said that she was paid by Mr. Ron Johnson, night manager at Club Expose at the time. Mr. Chmiel stated that shift pay was \$70 a night and that she would only have received \$280.

Ms. Roberts and Ms. Powers were then booked by Ms. Harris for the day shift at the Playpen in Oshawa for one week beginning the following Monday. She said that she was sick on the last day, Saturday, and after that, took no more week-long bookings, free-lancing for a few hours once or twice before deciding to stop working as a nude dancer. Ms. Roberts said that while nude dancing was not the "greatest profession for me in the world", she was "getting along fine" and was "sitting on top of the world" until she learned of Ms. Power's conversation with Mr. Chmiel during their week at his club.

The Board finds that Ms. Roberts was hired by Club Expose as a nude dancer for a one week period in February, 1992, and was paid a standard shift rate by Club Expose for her services. Ms. Roberts and Ms. Power were sent as partners by M. Productions, which was apparently paid by Club Expose for referral services. As stated earlier, the Board had no contracts or other documentation before it, to substantiate anything other than a casual agreement to employ Ms. Roberts for a period of one week..

2. Did Club Expose or Vince Chmiel infringe Laura Roberts' right to equal treatment with respect to employment?

a. Offer of re-employment

The substance of Ms. Roberts' complaint against Club Expose and Vince Chmiel is as follows. A couple of weeks after they worked at Club Expose, Ms. Power told her about a conversation which she had had with Mr. Chmiel during the week they worked for Club Expose. Ms. Roberts said that she immediately telephoned and spoke with Mr. Chmiel herself. The complaint is based on Ms. Power's conversation with Mr. Chmiel and Ms. Roberts' conversation with Mr. Chmiel.

i) Conversation between Ms. Power and Mr. Chmiel

Ms. Power testified that during the week they worked for Club Expose, she was approached by Mr. Chmiel and offered a drink. She declined and he identified himself as the owner of the club and asked her if she always worked with a partner. When she said yes, he said that he did not "hire black girls as a rule" but she was welcome anytime. She said that she did not feel comfortable at Club Expose and did not want to go back. She said that she did not tell Ms. Roberts about the conversation right away because she was just starting in the business and it might hurt her feelings. She said that Ms. Roberts eventually left the business because "she was not comfortable with the

racial undertones in a lot of places, just in general”, conditions which Ms. Power also observed. Ms. Power believed Ms. Roberts was meant for “higher things”.

Ms. Roberts said that Ms. Power told her that Mr. Chmiel had asked her to come back the next week but “she refused because he refused me because of my skin colour”. When asked why, Mr. Chmiel told Ms. Power that he “did not hire black girls”.

Mr. Chmiel, who had heard the testimony of Ms. Roberts, Ms. Power, and Ms. Harris, denied making any reference to race or colour in either conversation.

ii) conversation between Ms. Roberts and Mr. Chmiel

Ms. Roberts said that she was “blown away” when she heard of Mr. Chmiel’s conversation with Ms. Power as she “had made more money table dancing than any other dancer that week”. She called Mr. Chmiel at Club Expose the same night that she was told of the conversation. She said that he did not remember her at first but then recalled her as part of a lesbian couple. She asked him about his conversation with Ms. Power and he told her that he “did not like to hire black girls in his club”, that a few “come in free-lancing” and “that’s all the black girls he needs in his club”. She said that he said that “black girls brought in black patrons” and he did not “want black clientele in his club”. She said that she told him that people should be judged on how they do the work and that she had pulled in the most money. He replied that his “clients ...were not fond of black girls”, to which she replied that some customers had asked her where she would be the next week so they could see her. She said that she became “hysterical on the phone, [she] could not believe that these words were being said to [her]”. Ms. Roberts testified that she felt she had done a good job and for “someone in authority to knock [her] down simply because [she was] a different colour” was devastating and she felt very hurt.

Mr. Chmiel recalled that he was busy when Ms. Roberts called and he could not place her until she confirmed she was part of a lesbian couple. He said that she was “upset about not being hired back”, that she had “just that day” discussed it with Ms. Power and had “gotten the impression” that the reason was that she was black. He said he did not recall the actual words he used, but denied saying she was not hired back because she was black. He recalled her saying she would take him to the Human Rights Commission.

iii) conclusions

At the hearing, Mr. Chmiel gave, in his testimony, several reasons for not hiring Ms. Roberts for a second week while making the offer to her partner, Ms. Power. He stated that he offered Ms. Power a return engagement because he found her attractive and professional, and comfortable with clients. He said he did not offer Ms. Roberts the same for three reasons: 1.) she was awkward and uncomfortable with the work; 2.) it was club policy not to accept "double or nothing" deals with dancers; 3.) it was club policy not to allow dancers to have boyfriends or spouses in the club because it deterred the clients from approaching them. He implied that Ms. Power was giving him an ultimatum - it's both of us or nothing. He also implied that their sexual orientation was evident and would discourage customers from approaching them and therefore depreciated the 'entertainment dollar'. He said at one point that he had no opinion as to either dancer's performance, i.e. whether it was above or below average, and at another point, that he had made particular assessments of their performance. He also suggested that he had discussed the adequacy of Ms. Roberts' performance with the Club's manager at the time, Mr. Johnson, who reportedly said that Ms. Roberts was "overly protective", and "easily offended to a greater extent than the normal person might be with respect to racial background" and that this led to the decision not to ask Ms. Roberts back.

The Board found Mr. Chmiel's testimony, in its manner and substance, to be lacking in credibility. Had any of these reasons existed prior to the hearing, it is difficult to understand why they were not advanced earlier. Mr. Chmiel submitted that his failure to give an explanation earlier should not "negate its validity or credibility" given his "time constraints" because of other demands and requirements of him. Taken in context with his entire testimony and conduct in the proceedings, the Board finds this submission without merit.

Mr. Chmiel testified that any decision regarding particular dancers was simply a business decision, premised on how to get the most out of the club's entertainment budget dollar. He said that Club Expose had no restrictions and he was more than willing to accept a booking agent's judgment as to whether or not an applicant was appropriate for his club. He also said that decisions as to whether a dancer was appropriate was solely his and his manager's. Mr. Chmiel offered as criteria - whether a woman was comfortable with the job and approachable and in demand by customers - but gave no credible or consistent evidence to establish that he assessed Ms. Roberts' on this basis.

Ms. Harris testified that she was not aware of Club Expose having booking restrictions based on colour in February 1992. She said that she had just started doing bookings from Mr. Chmiel a month or so prior to sending Ms. Roberts to the club. Ms. Harris gave testimony dealing with Club Expose's policy as she understood it in June, 1992 when she worked as its night manager,

responsible for hiring nude dancers. She testified that she was told not to put "black girls on the schedule", i.e. they were allowed to free-lance only. She said that this changed later and she booked a few black nude dancers while she was employed at the club. She claimed to have been aware of a human rights complaint against the club but said she did not know it involved Ms. Roberts. Mr. Chmiel testified that, not only did Ms. Harris know it involved a dancer she booked, but she gave him advice as to how to deal with the complaint: book black nude dancers and document it to show to the Commission in the club's defence.

By June, 1992, the club was already aware of Ms. Roberts' complaint, and its practice then does not establish what was said or done in February, 1992. Ms. Harris' statement that when she was first hired as night manager, her instructions were to not put black dancers on schedule, is of some relevance in that it is consistent with Ms. Roberts' and Ms. Power's recollection of their conversations with Mr. Chmiel.

Clearly, Ms. Roberts was sent to Club Expose "on schedule" and accepted for one week by Club Expose in February, 1992. The allegation of discrimination arises only in the context of the reported restricted offer of employment for a second week, by Mr. Chmiel to Ms Power, and in his statements to Ms. Roberts directly a couple of weeks later.

Having observed the witnesses and considered their testimony, the Board finds that an offer was made to Ms. Power on the condition she return alone and that the reason given by Mr. Chmiel to Ms. Power was that Ms. Roberts was black. In other words, Ms. Roberts was not asked to return the next week because she was black. The Board finds that Mr. Chmiel told Ms. Roberts that he did not want to hire her because she was black and that "black girls" brought in undesired black clientele. The Board does not accept the reasons given by Mr. Chmiel at the hearing for not hiring Ms. Roberts back. They appeared to have been made up as he went along, based on his observations of the testimony of Ms. Power and Ms. Roberts.

To refuse to hire someone because of colour or race is to deny that person's right to equal treatment with respect to employment because of a prohibited ground, and contravenes the *Code* provisions in s. 5 and 9.

3. What remedy is appropriate?

a. Commission's submissions

Although Club Expose is no longer in operation by Mr. Chmiel, the Commission asks that orders be issued against 879678 Ontario Limited, operating Club Expose, and against Mr. Chmiel, personally.

The Commission has asked for special damages in the amount of one week's remuneration (the income she would have earned had she been asked back along with Ms. Power). This was calculated as 6 days @ \$60 per shift, plus \$200 @ shift for tips for a total of \$1480.

The Commission has asked for general damages in the amount of \$10,000, on the basis that the infringement was wilful. The Commission also asks for interest on both judgments in accordance with the Courts of Justice Act @ 6.3% from February, 1992 to the date of the order.

The Commission argues that the Code's provision for a maximum of \$10,000 is not to be taken as a measure of the worst possible case, with all other cases to be scaled down from there. Counsel submitted that the proper approach to quantum was as set out in Morgoch v. City of Ottawa 11 C.H.R.R. D/80 (February 1990). In that case, refusal on three occasions by the City of Mr. Morgoch's application for a position as a firefighter based on his having seasonal allergies was found to be discrimination because of a disability. That Board heard considerable evidence as to the impact of the City's "repeated infringements of his rights" on Mr. Morgoch and his family and quoted with approval statements in Underwood v. Smiths Falls (Town) Commissioners of Police (1985) 7 C.H.R.R. D/3876 as follows:

The setting of the maximum amount that may be awarded as general damages at \$10,000.00 is undoubtedly a reflection of legislative concern over the extent of power to be conferred on boards of inquiry under the Code, and not meant as a benchmark against which these awards are to be measured...Obviously the worst conceivable cases of mental anguish could not be adequately redressed by an award of \$10,000.00 in general damages, and if all other cases are to be scaled down according to the relative degree of anguish suffered, the quantum of general damages awarded in most cases would be trivial.

The Board considered the following passage from Cameron v. Nel-Gor Castle Nursing Home (1984) 5 C.H.R.R. D/2170 as appropriate:

It is now a principle of human rights damage assessment that damage awards ought not to be minimal, but ought to provide true compensation other than in exceptional

circumstances, for two reasons. First it is necessary to do this to meet the objective of restitution, as set forth above. Second, it is necessary to give true compensation to a complainant to meet the broader policy objectives of the Code: It is necessary that damage awards not trivialize or diminish respect for the public policy declared in the *Human Rights Code*.

The Board in Morgoch's case considered \$6,500 appropriate to reflect injuries suffered to date and no order for additional interest was made.

The Commission also cited *Cunningham v. Royal Canadian Legion*, an unreported decision of a Board of Inquiry dated February 26, 1993, which granted \$5,000 general damages plus interest to the complainant who had been discriminated against on the basis of sex while employed as a part-time waitress, and *Jenner v. Pointe West Development Corp.*, an unreported decision of a Board of Inquiry dated April 5, 1993. In the latter case, it was found that a woman was refused employment because she was pregnant, resulting in discrimination on the basis of sex. Citing the complainant's fear of getting pregnant when looking for a job, the Board stated that such fear constituted mental anguish as it "interferes with what is surely one of the most important and intimate decisions which any woman can make in her life, namely whether or not to bear a child" and awarded \$5,000 damages, plus interest.

b. Respondent's Submissions

Mr. Chmiel submitted that Ms. Roberts' claim of a Club Expose policy to not hire black nude dancers was not supportable and it was obviously not proveable as the club had hired Ms. Roberts for one week in February, 1992 and had hired other black nude dancers in the summer of 1992. Ms. Roberts was sent to his club which was "happy with her" and he did not refuse to hire her. He said while it is generally club policy to respect the agent's selections, he has sent back dancers who were not desirable because of tattoos or weight.

Mr. Chmiel argued against special damages on the basis that Ms. Roberts worked the second week, did not request a second week at the club, and therefore was not out of pocket and gave up nude dancing a few weeks later.

Mr. Chmiel stated that he was "not a bigot", some of his "best friends were black", and the reason he showed up at the hearing was to "clear his name".

c. Conclusions

(i) general damages

Where a board of inquiry, after a hearing, finds that a right has been infringed in contravention of the Code, by s. 41, it may “direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices” and “direct the party to make restitution, including monetary compensation, for loss arising out of the infringement” and “where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding \$10,000, for mental anguish”.

The Board has considered all the circumstances of this complaint. It is of the view that Vince Chmiel and Club Expose acted wilfully in their dealings with Ms. Roberts. In the business, as described by Mr. Chmiel and Ms. Harris, Ms. Roberts was just one more product to be consumed by demanding customers. That customers should have a preference for one colour of product over another was just a fact of the business which had to be addressed to remain competitive and make a profit. Defensible as this argument may be in terms of a balance sheet, it is not defensible in terms of human rights.

The purpose of these proceedings is to determine whether a protected right has been infringed i.e. the right not to be discriminated against in employment on the basis of race or colour. Section 9 provides only that “no person shall infringe or do, directly or indirectly, anything that infringes a right” granted under the Code.. Mr. Chmiel, in the two conversations in issue, infringed Ms. Roberts’ right to equal treatment in employment without discrimination on the basis of race or colour. The decision not to hire Ms. Roberts for a second week was made because of her colour, not job performance.

It is public policy in Ontario, as stated in the Code's preamble,:

to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province...

The decision by a woman to earn money by nude dancing can be made for a variety of personal, economical and societal reasons. In Ms. Roberts' case, having made that decision, she found that she was to be judged not just by her skin, but by the colour of it. The Board has no doubt that this had a profound impact on Ms. Roberts and caused her considerable mental anguish.

Ms. Roberts is a mature woman who made a decision to engage in employment which, in and of itself, she found affronted her dignity. In obtaining such employment she became aware of racial "undertones" prevalent in the business which Mr. Chmiel chrystalized and gave expression to in his blunt and matter of fact statements.

It is the job of this Board to apply the protections afforded by the Code and order an appropriate remedy. The public nature of the process is to assist in public education and understanding of the principles inherent in human rights legislation. The Board agrees that an award for general damages should not trivialize or diminish respect for the public policy declared in the Code but it does not agree that the Commission's request for \$10,000 damages is appropriate to the circumstances of this case.

The Board notes that Ms. Roberts was suffering mental anguish over her decision to earn money as a nude dancer, in addition to the anguish inflicted by Mr. Chmiel's statements and actions, as evidenced by her own statements and those of Ms. Power. The compensation which this Board can address only involves the latter.

The Board feels that an award for general damages of \$2000 is appropriate in all the circumstances of this case. It addresses the impact on Ms. Roberts of the conversation with Mr. Chmiel.

The discriminatory practices of the clubs of this type as evidenced by the testimony in this hearing appear widespread and the Board hopes that the Commission will endeavour to address this through its public education function to emphasize to club owners, such as Mr. Chmiel, that they are subject to and must abide by the public policy declared in the Code.

ii) special damages

The Board has some concerns about this aspect of the claim. An offer was made and rejected by Ms. Power but on the specifics of that offer, her testimony was vague. As she put it, it was more of an open-ended offer than a specific offer for the following week. Ms. Roberts was also not

specific that the offer was for the following week rather than a general offer to come back. Only Mr. Chmiel's testimony was clear that it was a decision to "keep" or ask back a dancer booked on a one-week basis.

Accepting that it was an offer to come back the following week, which was declined by Ms. Power as it specifically excluded her partner, Ms. Roberts, what are the special damages which flow from this, given that the exclusion was based on colour or race? The Commission calculated \$1480, being \$60 shift pay plus \$200 tips per night for 6 nights. Mr. Chmiel stated shift pay was \$70 and tips would vary and could not be verified. The Commission's claim of \$200 was based on Ms. Roberts statement that "the majority of the time I probably made over \$200.00 each night." Ms. Roberts was a credible witness and her testimony on this point will be accepted.

The Board determines special damages of \$70 a shift nightly for 6 nights for \$420, being the amount Mr. Chmiel would have paid to Ms. Roberts had he retained her services for an additional week, is appropriate, plus tips in the amount of \$1000.

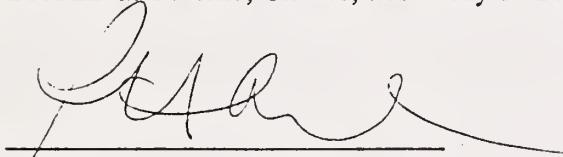
d. order

IT IS ORDERED THAT:

1. The Respondents are jointly and severally liable for the amounts stated in this order.
2. The Respondents pay to the Complainant the sum of \$1,420 for lost wages with interest of 6.3% from February 9, 1992 to the date of this order..
3. The Respondents pay to the Complainant the sum of \$2,000 for mental anguish.
4. The Respondents pay interest on the total of the amounts set out in paragraphs 2 and 3, from the date of this order until payment of these amounts, at the rate of interest which would ordinarily be applicable if this were a court order under the Courts of Justice Act.
5. The Respondents shall post in any operation or business that he or it operates, copies of the Declaration of Management Policy of the Ontario Human Rights Commission and shall make available to employees and patrons in reasonable quantities and at reasonable

locations, literature or brochures prepared by the Ontario Human Rights Commission with respect to rights and obligations provided under the Code.

DATED at Toronto, Ontario, this 8th day of September, 1993.



R. Hartman, Board of Inquiry

(

(

(